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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

EDA HENSCHER et al.,

Plaintiffs and Appellants,

v.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. et al.,

Defendants and Respondents.

B249430

(Los Angeles County
Super. Ct. No. EC058763)

APPEAL from an order of the Superior Court of Los Angeles County, Donna Fields Goldstein, Judge. Affirmed.

Law Office of Nick A. Alden, Nick A. Alden and Aleksey Sirotin for Plaintiffs and Appellants.

McGuireWoods, Joseph V. Quattrocchi, Jr., Leslie M. Werlin and Grace B. Kang for Defendants and Respondents.

Plaintiffs and appellants Eda Henschel and Afshan Safarian (“plaintiffs”) filed a motion for attorney fees pursuant to Civil Code section 1717 (the “fee motion”), which the trial court denied. Plaintiffs appeal that ruling, contending that the court’s denial of their motion constituted an abuse of its discretion. We disagree, and so affirm.

Background of the Case

On June 20, 2012, plaintiffs filed a complaint against Mortgage Electronic Registrations Systems, Inc; BAC Home Loans Servicing, LP aka Countrywide Home Loan Servicing LP; Quality Loan Service Corp and Doe defendants (“defendants”). The complaint pleaded the following causes of action: (1) Breach of Contract; (2) Violation of Fiduciary Duties; (3) Promissory Estoppel; (4) Fraud; (5) Unfair Business Practices; (6) Quasi Contract; and (7) Quiet Title. Concurrently therewith plaintiffs filed an ex-parte application for a temporary restraining order (“TRO”) seeking to enjoin defendants from foreclosing on real property located at 2121 Scott Road, Unit 201, Burbank, California 91504 (the “Property”). The court granted the TRO and set a hearing date of July 25, 2012 on an Order to Show Cause re the issuance of a preliminary injunction. Plaintiffs and defendants stipulated that the OSC would go off calendar and that defendants would stay the foreclosure proceedings pending the final outcome of the litigation initiated by the plaintiffs.

On July 20, 2012, defendants filed a demurrer to the complaint. In response thereto, plaintiffs filed a First Amended Complaint which added a cause of action for a violation of Civil Code section 2923.5, deleted a cause of action for breach of fiduciary duty, and added Bank of America N.A. as a defendant.

On October 9, 2012, defendants filed a demurrer to all the causes of action of the First Amended Complaint. On December 12, 2012, the court sustained the demurrer in its entirety with ten days’ leave to amend. On December 31, 2012, plaintiffs filed an untimely Second Amended Complaint. This complaint was the same as the First Amended Complaint, except that it included two additional causes of action, for Cancellation of a Deed of Trust and Breach of a Trial Payment Plan.

On January 22, 2013, defendants filed (1) a Motion to Strike the Second Amended Complaint; (2) a Motion to Dismiss the Entire Action With Prejudice and for Entry of Judgment in favor of defendants, both of which were based on plaintiffs' failure to file their Second Amended Complaint within the time period allowed by the court; and (3) a demurrer to the Second Amended Complaint. All motions were calendared for hearing on March 13, 2013. On February 28, 2013, plaintiffs filed and served their oppositions to the motions and the demurrer. On March 13, 2013, the trial court granted the motions to strike and to dismiss, and took the demurrer off calendar as moot. It dismissed plaintiffs' lawsuit on the same date. On March 15, 2013, the court entered judgment, which stated in pertinent part: "IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment shall be and hereby is entered in favor of Defendants and against Plaintiffs EDA HENSCHER and AFSHAN SAFARIAN (Plaintiffs) on all causes of action alleged in their Second Amended Complaint and that Plaintiffs shall recover nothing against Defendants in this action."

On March 20, 2013, plaintiffs filed a motion to vacate the order of dismissal and to set aside the judgment. The Motion to Vacate was brought pursuant to Code of Civil Procedure section 473, subdivision (b), and the request for the relief sought was based upon the attorney error provision of that code section. The motion was set for hearing on May 1, 2013. Filed concurrently with the Motion to Vacate was a proposed Third Amended Complaint. Plaintiffs requested that upon the granting of relief from default, the court deem the Third Amended Complaint filed and served. However, on April 15, 2013, plaintiffs withdrew the Motion to Vacate.

On April 25, 2013, plaintiffs filed the fee motion, in which they asserted that they were the prevailing parties in the underlying action. On May 15, 2013, the trial court heard and denied the fee motion.

In the interim, on May 2, 2013, plaintiffs filed their notice of appeal of the judgment entered by the court on March 15, 2013. Thereafter on June 11, 2013, plaintiffs filed a notice of appeal from the court's ruling denying their attorney fee motion.

On June 11, 2014, this court issued its opinion in plaintiffs' appeal of the judgment of dismissal. In our opinion, we held that the trial court had abused its discretion in granting defendants' motion to dismiss the case. However, we affirmed the rulings of the trial court because plaintiffs, by moving for attorney fees, waived their right to challenge on appeal the court's ruling granting defendant's motion to dismiss the case.

Plaintiffs now challenge the ruling of the trial court denying their motion for attorney fees.

Discussion

1. Did the Trial Court Abuse its Discretion in Finding that Plaintiffs Were Not the Prevailing Parties in the Action and thus Denying their Motion for Attorney Fees?

On March 15, 2013, the trial court entered judgment in favor of defendants, stating that "Plaintiffs shall recover nothing against Defendants in this action." Accordingly, defendants were totally victorious in the trial court on all causes of action pleaded by the plaintiffs, including the cause of action for breach of contract.¹

Section 1717, subdivision (b)(1) of the Civil Code provides: "[T]he party prevailing on the contract shall be the party who recovered [the] greater relief in the action on the contract." The trial court has broad discretion in determining the prevailing party. (See *Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 56.) Discretion is abused only when a court's decision exceeds the bounds of reason or contravenes uncontradicted evidence. (*Take Me Home Rescue v. Luri* (2012) 208 Cal.App.4th 1342, 1351.)

Plaintiffs contend that despite the judgment entered in favor of the defendants, they were the prevailing parties because they achieved their litigation objective, that is, to prevent the foreclosure of the deed of trust secured by the property. The trial court clearly thought that this argument was without merit. We agree with the trial court.

¹ Defendants did not seek an award of their attorney fees.

According to the plaintiffs' appellate brief, the entire purpose of the underlying action was to stop a non-judicial foreclosure of a deed of trust constituting a lien on the property. This is the same argument which was made and rejected in the trial court, and is belied by the record. The original complaint as well as each of the amended complaints, in addition to seeking to halt the foreclosure, also sought significant monetary relief including compensatory damages and punitive damages, additional unspecified monetary relief, and non-monetary relief consisting of a declaration of quiet title.

There is nothing in the record before us to demonstrate that after plaintiffs secured a cancellation of the notice of intent to foreclose, they abandoned their claims for monetary and non-monetary relief. Rather, they continued to pursue these claims long after the notice of foreclosure was cancelled. In fact, they not only strenuously opposed defendants' motion to strike the Second Amended Complaint and to then dismiss the action, but on March 20, 2013, they also filed a motion to vacate the judgment and the orders upon which the entry of judgment was based. Then on May 2, 2013, they filed a Notice of Appeal from the court's ruling granting judgment to defendants and continued to prosecute that appeal, with this court rendering its opinion affirming the judgment on June 11, 2014. Moreover, plaintiffs sought to file a Third Amended Complaint after the foreclosure was cancelled. Substantial evidence supports the trial court's conclusion that plaintiffs had not truly achieved their litigation objectives when the notice of foreclosure was rescinded by the defendants, based on their subsequent conduct, including: (a) opposing the motions to strike and to dismiss; (b) preparing and attempting to file a Third Amended Complaint; (c) preparing and filing the Motion to Vacate, and (d) filing and prosecuting the appeal of the judgment. Plaintiffs' contention that they were the prevailing party and thus entitled to an award of attorney fees pursuant to Civil Code section 1717 is disingenuous.

Plaintiffs have also failed to provide us with any basis for determining that, in denying their motion for attorney fees, the trial court abused its discretion. As noted above, discretion is abused only when a court exceeds the bounds of reasons or

contravenes non-contradicted evidence. (*Take Me Home Rescue v. Luri, supra*, 208 Cal.App.4th at p. 1351.) We find that the trial court’s ruling was reasonable and certainly did not “exceed the bounds of reason.” Even if we were to disagree with the trial court’s decision (and we do not), we are required to uphold it if it is reasonable. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

Finally we note that plaintiffs’ “practical approach” argument fails. Decisions that employ the “practical approach,” including those cited by plaintiffs, limit its application to cases in which the plaintiff voluntarily dismissed the lawsuit. (See *Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1018 [the practical approach has been adopted to determine the prevailing party for purposes of awarding attorney fees in a pretrial *voluntary* dismissal situation].) Here there was an *involuntary* dismissal by the trial court of all of plaintiffs’ causes of action.²

2. *Code of Civil Procedure section 1032 does not determine prevailing party status under Civil Code section 1717.*

Plaintiffs contend that they are the prevailing party within the meaning of Code of Civil Procedure section 1032 and therefore they are the prevailing party under Civil Code section 1717. This argument is simply wrong. (See, e.g., *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1572 [“[T]he premise for this argument, that a litigant who prevails under the cost statute is necessarily the prevailing party for purposes of attorney fees, has been uniformly rejected by the courts of this state”]; *McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn.* (1991) 231 Cal.App.3d 1450, 1456 [“We emphatically reject the contention that the prevailing party

² Plaintiffs also cite in their brief on appeal several statutes and cases dealing with federal civil rights statutes, the California private Attorney General statute, and the California Records Act to support their argument that they were the prevailing party and entitled to an award of attorney fees. None of these statutes are applicable in the present case dealing with attorney fees under section 1717 of the Civil Code and we do not discuss them further.

for the award of costs under section 1032 is necessarily the prevailing party for the award of attorney fees”’].)

Disposition

The order of the trial court denying plaintiffs’ fee motion is affirmed. Defendants are awarded their costs on appeal.

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MINK, J.*

We concur:

MOSK, ACTING P. J.

KRIEGLER, J.

* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.